IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-496

BENSON A. WOLMAN, *et al.*,

Appellants,

—v.—

MARTIN W. ESSEX, etc., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

BRIEF OF THE STATE CONVENTION OF BAPTISTS IN OHIO, THE CHURCHES OF GOD IN OHIO (Anderson, Indiana Affiliated), THE OHIO FREE SCHOOLS ASSOCIATION, AND THE OHIO CONFERENCE OF SEVENTH-DAY ADVENTISTS, AS *AMICI CURIAE*

LEONARD J. SCHWARTZ
ANDREW M. FISHMAN
SCHWARTZ & FISHMAN
150 E. Mound Street
Columbus, Ohio 43215
(614) 221-2600
Attorneys for Amici Curiae

PHILIP DUNSON
145 North High Street
Columbus, Ohio 43215
(614) 228-4859
of Counsel.

RECORD PRESS, INC., 95 MORTON ST., NEW YORK, N. Y. 10014—(212) 243-5775
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Interest of Amici Curiae*

The State Convention of Baptists in Ohio is the governing body for the Southern Baptist churches in Ohio, representing approximately 400 congregations, and is affiliated with the Southern Baptist Convention which has more than ten million members in the United States. The Southern

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* Counsel for the appellants and appellees have orally consented to the filing of this brief. As soon as their letters of consent are forthcoming, they will be filed with the Clerk.

Baptists, both in Ohio and nationwide, have traditionally been in favor of a "wall of separation" between church and state and oppose any type of financial assistance to private, church-supported schools. *See, e.g.*, Brief of the Joint Conference Committee on Public Relations Representing the Southern Baptist Convention and others as *Amici Curiae* in *Everson* v. *Board of Education of Ewing Township*, 330 U.S. 1 (1947).

The Churches of God in Ohio (Anderson, Indiana Affiliated) are a confederation of 204 Ohio Churches of God consisting of nearly twenty-five thousand, two hundred members. The Churches of God in Ohio, speaking through their Executive Council, are opposed to any expenditure of public funds for the benefit of parochial schools.

The Ohio Conference of Seventh-Day Adventists comprises ninety-one (91) Seventh-Day Adventists churches in Ohio having approximately ten thousand members. Churches in the Ohio Conference operate twenty-three (23) schools having approximately 1350 pupils, but they do not accept the type of aid challenged in this brief. They believe that the only proper sources of funds for their schools are tuition and the voluntary contributions of their members and other churches and not through the payment of taxes to a government entity. The Ohio Conference of Seventh-Day Adventists is opposed to any expenditure of public funds for the benefit of church sponsored schools including its own.

The Ohio Free Schools Association (OFSA) is an Ohio not for profit corporation comprising approximately 1200 members throughout the state of Ohio interested in the protection and encouragement of the free public school system

in Ohio. More particularly, the OFSA is concerned with the preservation of the First and Fourteenth Amendments' guarantees of separation of church and state when applied to the educational system. The membership of OFSA includes many educators, religious leaders and lay people of all persuasions, who, collectively and individually, are working to oppose the enactment of legislation that threatens to violate the establishment or the free exercise clauses of our Federal Constitution.

This brief is filed to provide the Court with the views of *amici* that a comprehensive and consistent First Amendment Establishment Clause policy can be delineated from the Court's prior decisions, although the approach will require the overruling of *Board of Education* v. *Allen*, 392 U.S. 236 (1968).[1]

Amici also wish to record their belief that it is morally and constitutionally wrong for any person to be forced to support the activities of any church. When citizens are compelled through taxation to support the parochial school, they are being compelled to support the church of which that school is an extension.

Since the parochial school is by definition a component of a church, and the pupil is a component of the school, the granting of tax funds, or of goods and services purchased with tax funds, to the pupil is equivalent to granting those funds to the church. It is obviously impossible to aid the part without aiding the whole.

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[1] This general supposition is certainly not novel to *Amici*, *see, e.g.*, 54 N. Car. L. Rev. 216, 224 (1976), nor is it unrecognized by some members of the Court. *Meek* v. *Pittenger*, 421 U.S. 349, 378-79 (1975) (Brennan, J., concurring in part, dissenting in part).

The verbal cosmetics used to disguise the tax support being given to church endeavors in the instance here under consideration range from the claim that the aid is only for the "non-religious" or secular parts of their educational-indoctrinational operations, to the labeling of the aid as "loans" to the pupil rather than as gifts to the school. As for the former claim, it should be pointed out that church schools like church buildings are comprised of many elements and constituents which, taken by themselves, are strictly non-religious in character. Yet, when joined together and combined around a central and all-pervasive religious purpose, they comprise a religious entity, with every part partaking of the nature and orientation of the sectarian totality. The First Amendment will indeed be divested of any real meaning or force if it is construed to permit taxes to be levied for the support of allegedly non-religious activities of churches.

As for the claim that text-books are "loaned" by the state to the students who attend parochial schools, let us ask—"When are these textbooks to be returned to the state?" The answer is, "Never!" There is no provision made in the enactment for their return. But, and if, they are returned, it will not be by the students who "borrowed" them, but by the parish schools, and they will be returned as expendable items whose useful life is over. What is being called a "loan" to the student is palpably a gift to the parochial school system, and therefore to the church that operates that system.

The *Amici* submit that the massive parochiaid measure here under consideration is unconstitutional not only because it violates the First Amendment's religious liberty stipulation, but also because it violates the "No establishment" clause. In effect, this legislation accomplishes a *de*

facto establishment of a few churches and grants preferential treatment to the particular method that they have chosen to use in teaching their youth. As Justice Douglas once stated:

> "The most effective way to establish any institution is to finance it; and this truth is reflected in the appeals by church groups for public funds to finance their religious schools." (*Schempp* v. *Abington School Dist.*, 374 U.S. 203 (1963)).

The *Amici* wish to point out that at least one large denomination that operates almost all the nonpublic schools in Ohio receiving benefits under the Auxiliary Services Act obtains more in *involuntary* contributions (i.e. tax aid), just for its educational activities on the elementary and secondary level, than any other church receives from all sources combined. When the state subsidizes one of the main functions of the largest church in the state, it has gone a long way towards establishing that church as the official tax-supported religion of the land.

All religious groups are confronted with exactly the same needs and problems in regard to teaching and indoctrinating their youth, but most of them have chosen to use other means to accomplish their purposes in this area, than the operation of expensive elementary and secondary schools which interweave secular and religious instruction. Other churches are able to live within their incomes, without imposing the costs of their operations upon the general public. We are speaking the often-repeated sentiments of these bodies when we urgently request the Court to prevent any church from using the tax-collecting power of the state to compel those who do not subscribe to its tenets to pay the costs of its operations.

Statement of Facts

Plaintiffs-appellants[2] brought this action to challenge the constitutionality of Ohio Revised Code § 3317.06 (hereinafter sometimes referred to as the "Statute" or the "Act"), which makes certain services and materials available to students attending non-public religious schools.[3] The case was tried before a three-judge district court which sustained the Act and this direct appeal followed.

Following the example of the appellants' Jurisdictional Statement, see pages 4-7, the relevant provisions of the Act will be summarized rather than quoted in full:

Section A provides for textbook loans to pupils or their parents. This provision is, of course, a response to this Court's holding in *Board of Education* v. *Allen*, 392 U.S. 236 (1968).

Section B authorizes local public school districts "to purchase and to loan" instructional material to pupils attending parochial schools. Although there is an attempt to delineate between secular and non-secular materials, it has been stipulated that this section approves the loaning of the same materials which were authorized in a previous

[2] Hereinafter the parties will be designated as they were in the trial court.

[3] While the statute involved here speaks in terms of aid to nonpublic schools, religious and secular alike, the district court, in previous church-state litigation, recognized that "the vast majority of nonpublic schools [in Ohio] are sectarian." *Kosydar* v. *Wolman*, 353 F.Supp. 744, 762 n.22 (S.D. Ohio 1972), *aff'd sub nom. Grit* v. *Wolman*, 413 U.S. 901 (1974). Hence the characterization of the statute as aiding "religious" schools is not unreasonable.

Ohio law which was declared unconstitutional in light of *Meek* v. *Pittenger*, 421 U.S. 349 (1975).

Public schools are empowered under Section C to loan instructional equipment in an identical manner to that established by Section B for instructional materials. And, like the material authorized in Section B, the equipment available under this section is the same equipment catalogued in the prior unconstitutional Ohio law.

Section D licenses the providing of "speech and hearing diagnostic services to pupils attending nonpublic schools. . . ." The services are to be performed "in the nonpublic school[s]."

Medical, dental and optometric services are sanctioned within the nonpublic schools by Section E, Section F grants diagnostic psychological services to pupils at the nonpublic school while Section G provides for "therapeutic psychological and speech and hearing" assistance away from the private school, "in public centers or in mobile units located off of the nonpublic premises. . . ."

Section H allows "guidance and counseling services" to be performed in public schools, public centers or mobile units in language similar to that employed in Section G.

Also following the outline of Sections G and H, Section I authorizes "remedial services" to be performed in public schools, public centers or mobile units.

Section J prescribes "standardized tests and scoring services" supplied by the public school system for the use by students of parochial schools.

Section K charters programs to be implemented by the public school district "for the deaf, blind, emotionally disturbed, crippled, and physically handicapped children attending nonpublic schools within the district." These programs, too, are to be furnished off of the premises of the private school.

The last substantive section, Section L, provides transportation for field trips for students in nonpublic schools.

The remainder of the statute is administrative but does have some highly relevant language, some of which is set out in detail in the appellants' Jurisdictional Statement at pages 7 and 8.

ARGUMENT

I.

Introduction

Amici's position in this action is that this Court's decision in *Board of Education* v. *Allen*, 392 U.S. 236 (1968) (hereinafter sometimes cited as *"Allen"*), should be overruled[4] since the case has generated the wave of constitutional litigation that Professor Freund so astutely predicted in his 1969 Comment, *Public Aid To Parochial Schools*, 82 HARV. L. REV. 1680, 1681 (1969) (hereinafter cited as "Freund"). *See also* 392 U.S. at 250 (Black, J., dissenting). In fact, *amici* would suggest that careful analysis demonstrates that *Allen* is a constitutional fossil, based upon a faulty premise, namely that the secular and religious mission of the religiously oriented primary and secondary school can be divided into a pure religious component and an untarnished non-religious component,[5] *see, e.g., Meek* v. *Pittinger*, 421 U.S. 349, 365-66 (1975) (hereinafter sometimes cited as *"Meek"*); *see generally* Note, *Aid to Parochial Schools: The Test Flunks*, 52 CHI-KENT L.

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[4] Although we have particularized our argument as applying to *Allen* alone, *amici* fully realize that *Meek* v. *Pittenger*, 421 U.S. 349 (1975), too validated a textbook loan plan; however, it seems to have done so solely on the basis of *stare decises*. *Cf.*, 421 U.S. at 359, 362.

[5] *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), and *Quick Bear* v. *Leupp*, 210 U.S. 50 (1908), were the authority the Court used in *Allen* for its conclusion that nonpublic schools provided secular education. *Pierce* involved the question of whether attendance at a private school could qualify as attendance under a compulsory education law. In *Quick Bear* the Court allowed Indians to receive education at religious schools at their own cost. Neither seems very relevant to the aid to parochial education issue.

Rev. 683 (1976), and that attempts to draw upon its premise have led to legal and factual distinctions without meaningful differences. *See, e.g.,* Nowak, *The Supreme Court, the Religion Clauses and the Nationalization of Religion,* 80 Nw. L. Rev. 883, 890-91 (1976). This is a result which several members of the Court have at times recognized. *Meek,* 421 U.S. at 384 (Brennan, J., concurring in part, dissenting in part).

As a result, *amici's* particular interest in this case lies in the textbook loan program which presents the Court with the opportunity to review and, hopefully, overturn, *Allen.*[6] This brief, then, is primarily concerned with the proposition that *Allen* is no longer constitutionally sound and will leave it to appellants to argue the limits of permissible services that may be provided to children attending religious schools after *Meek.*

However, our focus should not be taken as a repudiation of the appellants' position that *Allen* need not be overruled for them to prevail. Rather, it is *amici's* feeling that while *Allen* can be distinguished and limited as it was in *Meek,* a more fruitful approach to the entire establishment clause-aid to sectarian education controversy can be established if *Allen,* the "genesis of the confusion" apparent in this area of the law, *A Survey of Selected Contemporary Church-State Problems,* 51 Notre Dame L. Rev. 737, 761 (1976), is allowed a respectable fast death as opposed to survival, only to be amputated piece by piece. Without *Allen* inter-

[6] This is not to say that *amici's* interest is solely limited to the textbook loan program. However, we believe that any proper construction of the First Amendment must begin with the overruling of *Allen.*

fering, a common thread can be found that neatly ties together the previous aid to parochial education cases and effectively weaves the tight comprehensive "wall of separation" that *amici* believes the First Amendment commands.

We intend to demonstrate this thesis by first discussing the reasons behind the First Amendment's establishment clause and the case law construing it. In this context we will follow the Court's development of the current "three-prong" (or perhaps "four prong") test utilized in assistance to religious elementary and secondary education cases. *See generally,* 50 Wash. L. Rev. 653, 655-660 (1975).

Secondly, we will examine the history of the aid to sectarian schools litigation in Ohio and the legislative attempts to circumvent the First Amendment. We do so fully appreciating the right of the state to enact legislation which attempts to pass constitutional muster by eliminating the evils pointed out in past decisions of the Court; however, in the case of the establishment clause, this recurrent theme has led to just the type of political debate and division that the First Amendment sought to forestall. *See, Committee for Public Education and Religious Liberty* v. *Nyquist,* 413 U.S. 756, 795 (1973); Freund, 82 Harv. L. Rev. at 1692.

Finally, based on this foundation, we will suggest that a possible test for measuring state programs of aid to religious schools, which is akin to *Everson* v. *Board of Education,* 330 U.S. 1 (1947) (hereinafter sometimes cited as "*Everson*"), can be found permeating this Court's pre-*Allen* and post-*Allen* parochial aid opinions.

II.

The Historical Setting

The First Amendment to our Federal Constitution mandates that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof," and, to be permissible, aid to primary and secondary religious educational institutions must come within its requirements.

That a strict separation between church and state was incorporated into the Bill of Rights was not an accident. Our founding father's ancestors had come to this continent in order to avoid the turnmoil, civil strife and persecutions generated by religious differences. Yet few of these settlers were advocates of religious freedom for others, for wherever they settled they established their own "state"—sponsored churches. The very charters granted these colonists usually guaranteed the right to erect religious institutions which all, believers or non-believers alike, were required to support and attend.[7]

So the practices of the old world passed to the new, and the old religious persecutions became new ones. And all of the non-believers, according to the description in *Everson* "were compelled to pay tithes and taxes to support government-sponsored churches whose ministers preached inflammatory sermons designed to strengthen and consolidate the established faith." *Everson* v. *Board of Education of Ewing Township,* 330 U.S. 1, 10 (1947).

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[7] Examples of such charters can be found in the opinion of the Court in *Everson* v. *Board of Education of Ewing Township,* 330 U.S. 1, 9 n.6 (1947), where the Court examines in detail the source of the First Amendment.

These practices shocked men like Madison and Jefferson and this shock and indignation ultimately found its expression in the First Amendment. First, however, their vexation became embodied in Madison's "Memorial and Remonstrance Against Religious Assessment", which is attached as an appendix to the dissent in *Everson,* 330 U.S. at 63, and in Jefferson's "Virginia Bill for Religious Liberty."

When one reads these several documents out of our past, he or she cannot quibble with Mr. Justice Rutledge's assertion that "no further proof is needed that the Amendment forbids any appropriation, large or small, from public funds to aid or support any and all religious exercises," 330 U.S. at 41 (Rutledge, J., dissenting), or with Mr. Justice Black's affirmation that "[t]he First Amendment has erected a wall between church and state. That wall must be kept high and impregnable." *Id.* at 18.

The first major case claiming that state aid to nonpublic schools was in violation of the First Amendment was *Everson* v. *Board of Education of Ewing Township,* 330 U.S. 1 (1946). *Everson* involved a plan whereby the state was to reimburse parents of all school children for the cost of bus transportation to and from school. The statute was challenged as being a law "respecting an establishment of religion" in that the benefit flowed through the parent to the parochial school.

By a five to four vote the Court ruled that a state could constitutionally finance the bus transportation of children to parochial as well as public schools. Although the majority, speaking through Mr. Justice Black, found the plan to be on the "verge" of an establishment, 330 U.S. at 16, they upheld its constitutionality since the direct beneficiaries were the school children rather than the church-related

schools. Justice Black recognized that there was some benefit to the religious schools, but, he wrote, such benefit was only incidental and indirect.[8] Moreover, the *Everson* Court saw the statute as "public welfare legislation," 330 U.S. at 18, necessary to assure that every child would be transported in a safe manner.[9]

The Court at the outset made the point that "the State contributes no money to the Schools. It does not support them." *Id.* at 18. The Court then proceeded to succinctly establish the First Amendment prohibition against aid:

> New Jersey cannot consistently with the establishment clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church.

Id. at 16. The fact that the Court used the phrase "institution which *teaches* the tenets and faith of any church" (emphasis added) in drawing its stricture is of some note. Obviously, the line of demarcation is much narrower under the above interdiction than it would have been had the Court only limited the prohibition to the use of tax-raised funds to *teach* the faith. Nor was the choice of words simply an accident, for the Court went on to conclude that:

> No tax in any amount, large or small, can be levied to support any *religious activities* or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.

Id. at 16 (emphasis added).

Here, then, was a "wisp of doctrine" that those who sought public monies for church schools could grasp. For while Mr. Justice Black spoke of the "wall of separation", he found a way to save the New Jersey program. As a result of this opinion, "all manner of public aids to religious schools were advanced as benefiting individuals and not institutions." Morgan, *The Establishment Clause and Sectarian Schools: A Final Installment?*, 1973 SUP. CT. REV. 57, 61.

On the other hand, what the supporters of parochial aid failed to perceive was that Justice Black meant his opinion to be a "deliberate statement" setting the outside limit of permissable aid and not as a cornerstone to support various sorts of aid programs. *Board of Education* v. *Allen*, 392 U.S. 236, 250 (1968) (Black, J., dissenting). The obvious factor, although not articulated by the Court then or, for that matter, as yet, was that the aid granted in *Everson* did not cross the threshold into the school building. That is, the State did not enter the religious institution. If

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[8] The test established in *Everson* has become widlely known as the individual or child benefit theory and is, according to one commentator, "perhaps . . . one of the most frequently invoked ideas in church-state litigation." Dauper, *Everson* v. *Board of Education*: *A Product of the Judicial Will*, 15 ARIZ. L. REV. 307, 325 (1973). It has been extensively discussed as a means of justifying aid to parochial schools. *See, e.g.*, L. Pfeffer, *Church, State and Freedom*, 555-62 (1967); Areen, *Public Aid to Nonpublic Schools*: *A Breach of the Sacred Wall?*, 22 CASE W. RES. L. REV. 230, 248-53 (1971). However, much of the discussion has been sharply critical for placing form over substance. 58 MINN. L. REV. 657, 661 n.22 (1974).

[9] *Everson* is remembered not only for allowing state-aid to parochial schools, albeit on a very limited scale, but also because it was the first case to apply the establishment clause of the First Amendment to the states via the Fourteenth Amendment's guarantee of "liberty." In this context, *see Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940). While there was little discussion of this aspect of the case, the concept is now accepted as "given fact". Piekarski, *Request and Public Aid to Private Education*, 58 MARQ. L. REV. 247, 251 (1975).

Everson is so limited, and one cannot study his dissent in *Allen* without believing that Mr. Justice Black would approve of such a reading, the interpretation of the establishment clause becomes simple, though hardly simplistic. Hence, while *Everson* dug the channel through which aid could flow to the private, religious schools, "it simultaneously constructed the gates by which it might later stop the flow of such aid." 50 WASH. L. REV. 653, 656 (1975).

Although dealing with Bible reading in public schools, *Abington School District* v. *Schempp,* 374 U.S. 203 (1962), is important to this area of the law because it provided various members of the Court an opportunity for an exhaustive inquiry into the core meaning of the First Amendment. For our examination, however, it is sufficient to focus only on the holding, later applied to state aid cases, that:

> [T]o withstand the strictures of the Establishment Clause there must be a *secular legislative purpose and a primary effect that neither advances nor inhibits religion.*

Id. at 222. (Emphasis added.)

In *Allen,* 392 U.S. 236 (1968), this Court applied the two-pronged *Schempp* test to uphold a New York statute authorizing textbooks to be provided, ostensibly on loan, to children attending non-public parochial schools. Mr. Justice White, who wrote the opinion for the Court, purportedly followed *Everson's* individual-benefit theory but, in doing so, fused it with the *Schempp* "purpose and primary effect" test.

Mr. Justice Black, whose opinion in *Everson* was theoretically controlling, was incensed. Professor Richard

Morgan, writing in the 1973 SUPREME COURT REVIEW, described Black's position thusly:

> "Justice Black, whose *Everson* opinion was supposedly being followed, thought it was not, and that the New York arrangement represented precisely the sort of danger he had warned against in 1947.
>
> • • •
>
> Clearly Justice Black was right. The decision in *Allen* went a step beyond *Everson*. . . ."

Morgan, *The Establishment Clause and Sectarian Schools: A Final Installment,* 1973 SUP. CT. REV. 57, 63.

It was this step over the "verge" that has haunted the Court ever since. As will be seen, cases that followed *Allen* to the Court were burdened by the albatross. This is so because the premise that clearly underlies the Court's thinking in *Allen* is that education in a parochial school is separable into religious and non-religious components. Freund, 82 HARV. L. REV. at 1688. And, we suggest, this premise is wrong. There must be a religious element that is pervasive and inseparable, for, if not, there is no reason for parochial schools, whose entire *raison d'etre* is religious. *Id.*

The next major establishment clause case to come before the Court was *Walz* v. *Tax Commissioner,* 397 U.S. 664 (1969). While not an aid case, we mention it in passing because it was at this juncture that the Chief Justice nurtured what was to become the "third prong" of the establishment clause test. Although upholding a tax exemption for property used exclusively for religious purposes, the Court examined the exemption to see if the benefit created an "impermissible entanglement" between State and church. 397 U.S at 674.

During the 1970 Term, the Chief Justice completed the development of the three-prong test that had only been alluded to in *Walz*. The vehicle for his analysis was three cases[10] jointly decided under the title of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1970) (hereinafter cited as *"Lemon"*.[11]

The plan in *Lemon* provided for direct reimbursement to the nonpublic school for actual costs of books, instructional materials and teachers' salaries. The plan challenged in *Early* and *Robinson* enabled the state to pay a portion of the salaries of teachers employed by private schools.

The Court found that each plan had an excessive entanglement between church and State. However, even in rejecting the aid plans, the Court was beginning to be shadowed by *Allen*. The attempt to distinguish *Allen* on the ground that the statutes involved in *Lemon* provided aid directly while in *Allen* the aid went to the students is gossomer at best. *See* 403 U.S. at 621. And, Mr. Justice White scores the majority hard, when he points to the Court's "frank acknowledgement that 'we can only dimly perceive the boundaries of permissable government activity in this sensitive area of constitutional adjudication' [citation omitted] and that '(j)udicial caveats against entanglement'

[10] The cases decided besides *Lemon*, were *Early* v. *DiCenso* and *Robinson* v. *DiCenso*, 403 U.S. 602 (1970).

[11] The *Lemon* Court was the first to actually refer to a "three-prong" test: "First the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither inhibits nor advances religion . . . finally, the statute must not foster 'an excessive entanglement with religion.'" 403 U.S. at 612-13. The development of the test is tracted in *Wolman* v. *Essex*, 342 F. Supp. 399, 406-11 (S.D. Ohio 1972), *aff'd* 409 U.S. 808 (1972).

are a 'blurred, indistinct and variable barrier.'" 403 U.S. at 671 (White, J., dissenting).

On June 25, 1973, the Court handed down four opinions in the church state area. Three dealt with primary-secondary schools[12] while the fourth, *Hunt* v. *McNair*, 413 U.S. 734 (1973), upheld a South Carolina program which provided benefits to sectarian institutions of higher learning by allowing the institutions to borrow on the credit of the state.[13]

Of the four cases, however, *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973) (hereinafter cited as *"Nyquist"*), is the most important. In *Nyquist* a New York plan designed in the hope of satisfying the tests established in *Lemon*, *Walz* and *Allen*, 58 Minn. L. Rev. 657, 660-61 (1974), and which reimbursed parents for tuition paid, made direct grants to schools for the costs of maintenance and repair, and provided a tax credit for tuition payments to private schools was struck down. The Court concluded that all three components of the law

[12] The related cases decided on the 25th and not discussed in the above text were: *Levitt* v. *Committee for Public Education & Religious Liberty*, 413 U.S. 472 (1973) (invalidating a New York statute providing for reimbursement of private schools for certain costs of state required testing materials); *Sloan* v. *Lemon*, 413 U.S. 825 (1973) (holding unconstitutional a Pennsylvania statute providing tuition reimbursement to parents of nonpublic school children). *See also*, *Essex* v. *Wolman*, 409 U.S. 808 (1973), *motion for leave to file petition for rehearing denied*, 413 U.S. 923 (1973).

[13] *Hunt* and its predecessor, *Tilton* v. *Richardson*, 403 U.S. 672 (1971), are not consequential in this case since the differences between higher education and primary and secondary education raise different principles. *See, e.g.*, 413 U.S. at 746. *But cf.*, *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 172 (1971).

had a "primary effect that advances religion." 413 U.S. at 774.[14]

The primary objection was that no effort was made "to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes." 413 U.S. at 774.

As in *Lemon,* the *Nyquist* Court was bothered by the shadow of *Allen.* Mr. Justice Powell, the author of *Nyquist,* attempted to distinguish the program before the Court

[14] In this case the Court also stressed a fourth factor: "One factor of recurring significance in this weighing process is the potentially divisive effect of an aid program." *Id.,* at 795. It stated that while perhaps this factor was not conclusive, it was certainly a "warning signal" not to be ignored. *Id.,* at 797.

To the extent the Court has carved exceptions to the strict mandates of the establishment clause, states are now *permitted* to provide, whether directly or indirectly, certain types of aid to religious schools.

As such aid is permitted to continue, these schools will become more and more dependent upon it for their very existence.

Today we are faced with a political climate wherein the proponents of state aid to religious schools have the willing ear of the legislature.

One factor that appears to have been overlooked to a large degree is that there is no *requirement* that the state provide this aid.

Suppose therefore that the political climate changes and that the state legislatures become dominated by opponents of religious aid. What is to stop them from attempting to impose conditions upon the continuance of state aid. Suppose for example, they were to attach as a condition to an appropriation bill the requirement that all religious artifacts be eliminated from religious schools or that the tenets of the particular religion not be taught therein. What could be a clearer example of entanglement, or, indeed, of direct state intervention? And yet how could the church challenge so manifestly unjust a requirement? Any effort on their part to do so would result in the withdrawal of the state aid upon which they rely for their existence.

The potential for abuse of religion by the states is so enormous that it seems obvious that the "wall of separation" is likely to crumble in the dust of politico-religious turmoil and upheaval.

from those approved in *Allen* by pointing out that in *Allen* the textbooks were loaned to *all* children whereas only non-public school children participated in the *Nyquist* programs. But, the question still remains, why are textbook loans acceptable but not other types of secular loan programs directed solely to students? *See* 413 at 800-05 (Burger, C. J., dissenting.)

In *Meek* v. *Pittinger,* 421 U.S. 349 (1975), the Court was again faced with the *Allen* problem when it reviewed an auxiliary services and textbook loan program from Pennsylvania. The statute before the Court provided for loans of textbooks, instructional materials, instructional equipment and auxiliary services to students of qualifying non-public schools. All aid, in seeking to avoid the objections raised in *Lemon* was limited to non-sectarian, neutral and non-ideological functions. Further to avoid the objections of *Lemon* and *Nyquist,* the equipment, materials and auxiliary services were "loaned". Only the students and not the parochial schools were to benefit economically. And, in an effort to avoid further religious involvement, the auxiliary services were to be provided by employees of the public school system.[15]

This Court upheld only the loan of textbooks finding it to be substantially identical to the plan affirmed in *Allen.*

Although hardly distinguishable from textbooks by any rule of reason, 54 N. Car. L. Rev. 216, 222 (1976), the Court struck down instructional materials (clearly non-religious) since:

[15] The equipment allowed under the Pennsylvania act included projectors and recording equipment—clearly adaptable to religious training—and this portion of the act was struck down by the district court which approved the remainder of the program.

> [e]ven though ear-marked for secular purposes '[w]hen [aid] flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission,' state aid has the primary effect of advancing religion.

421 U.S. at 366.[16]

The *Meek* Court's upholding of the textbook loan provision on the basis of *Allen* simultaneously with its invalidating the loan of clearly nonreligious instructional materials on the basis quoted above, makes *Allen* the triumph of form over substance. 54 N. Car. L. Rev. at 222-23.

Reaching this same conclusion, one commentator states:

> Thus, the line drawn by the opinion of the Court in *Meek* is no more satisfactory than that drawn in *Nyquist*. The Court was again unwilling to resolve the more basic issue, *i.e.*, whether or not the secular educational and religious training aspects of these schools really are separable. Until the Court is willing to either accept the separability concept and apply it consistently or reject it entirely, the patently inconsistent opinions of the past eight years are likely to be repeated in the future.

[16] The Court noted that *Public Funds for Public Schools of New Jersey* v. *Marburger*, 358 F. Supp. 29 (D.N.J. 1973), *aff'd* 417 U.S. 961 (1974) directly supported their conclusion regarding the material and equipment loan provision of the act. Not surprisingly, the fact that *Marburger* affirmed the invalidation of a statute providing reimbursement to nonpublic school parents for their expenditures on secular textbooks was not discussed. *See, Marburger*, 358 F. Supp. 29, 31 (D.N.J. 1973).

A Survey of Selected Contemporary Church-State Problems, 51 Notre Dame L. Rev. 737, 769 (1976).[17]

The efforts of the legislature to avoid the objections previously found by the Court in *Lemon* and *Nyquist*, together with what has occurred after *Meek* as discussed in the next section of this brief, make it clear that so long as *Allen* remains the law of the land, this Court will be forced to rule on statute after statute, each statute evading prior objections, each hopeful of making further inroads into the separation of church and state. *See generally*, Note, *Aid to Parochial Schools: The Test Flunks*, 52 Chi.-Kent L. Rev. 683 (1976).

III.

Ohio: "The Dark and Bloody Background"

As stated in the Introductory section of this brief, it is our position that the Court's reluctance to overrule *Allen* has led to the adoption of a test which, at best, is confusing and, at worst, nonworkable. Moreover, the continued attempts to distinguish *Allen* from fact patterns brought before the Court have created just the type of political and social divisiveness that the First Amendment was meant to halt. *Cf.*, 421 U.S. at 372. As fast as courts void a repugnant statute, another is passed. *Cf., Lemon* v. *Kurtzman*, 403 U.S. at 624. Within each decision the proponents of parochial aid can always find just enough glimmer of hope to make another run to the legislature. *Cf., e.g.*, Skelly, *Meek* v. *Pittinger: Will It Precipitate a Solution*, 20 Catholic Lawyer 335, *especially at* 344-45 (1974). Usu-

[17] Of course, it is *amici's* opinion that separability is a fiction. 421 U.S. at 366. *Cf., Levitt* v. *PEARL*, 413 U.S. 472, 480 (1973).

ally time demonstrates that the hope was illusory but the legislative fights have long since occurred, leaving wounded feelings, deep scars and religious bigotry.

A good example of this can be found by looking at the history of aid to parochial education in Ohio, one state which has experienced more than its share of difficulty in this area. The Ohio legislature is subject to massive political pressure to provide vast amounts of financial aid to the parochial schools.[18] When acts are passed, they are couched in secular terms, but usually form is placed far above substance.[19]

Each legislative attempt to appropriate aid to sectarian schools has been met with a court challenge. *See, Wolman* v. *Essex,* 417 F. Supp. 1113 (S.D. Ohio 1976), *prob. juris. noted,* 45 U.S.L.W. 3463 (Jan. 10, 1977) (No. 76-496); *Wolman* v. *Essex,* No. CA 73-292 (S.D. Ohio 1973), *vacated,* 421 U.S. 982 (1975); *Kosydar* v. *Wolman,* 353 F. Supp. 744 (S.D. Ohio 1972), *aff'd sub nom. Grit* v. *Wolman,* 413 U.S. 901 (1974); *Wolman* v. *Essex,* 342 F. Supp. 399 (S.D. Ohio 1972), *aff'd* 409 U.S. 808 (1972) (hereinafter cited as *"Wolman I"*). And each successful court challenge has occasioned a new and more vigorous attempt by the Ohio Legislature to provide massive aid to the Ohio parochial schools.

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[18] The case at bar, for example, involves an appropriation of over 88 million dollars. *Cf., Meek* v. *Pittenger,* 421 U.S. at 365 n.15, where Mr. Justice Stewart points out that Pennsylvania appropriated $16,660,000 in 1972-73 for supplying just instructional materials and equipment to the state's parochial schools.

[19] The plans vary in degree of originality and have led Mr. Justice Brennan to write that ". . . it should be observed that sophisticated attempts to avoid the Constitution are just as invalid as simple minded ones." *Meek,* 421 U.S. at 381.

The first such attempt to skirt the Constitution came in response to *Lemon* v. *Kurtzman,* 403 U.S. 662 (1971), when the legislature passed and the Governor signed a plan for tuition reimbursement. On the very day that the act became law, *Wolman I* was filed and, on April 17, 1972, a three judge court ruled that the plan was unconstitutional.

Little over two months later, the Ohio General Assembly passed another bill. This time, a tax credit for parents of students enrolled in private schools was the means to attempt to circumvent this Court's opinions. Strikingly, the amount of money set aside to fund the program was almost the identical amount appropriated prior to, and which was in issue in, *Wolman I.*

Moreover, on the day the bill was passed, but before it was signed into law by the Governor, a suit was filed in state court by the State of Ohio[20] seeking a declaratory judgment to clarify the constitutionality of the Act. Upon filing, state officials boasted publicly that they had beat the opponents on this one. Defendants in that suit were persons who had previously challenged the constitutionality of aid to parochial schools.[21] The defendants subsequently removed the case to federal Court where the Act was declared illegal.[22]

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[20] Actually the case was brought in the name of the Tax Commissioner.

[21] In addition, parents of nonpublic school children were joined as defendants but were realigned as parties plaintiff by the United States District Court. *Kosydar* v. *Wolman,* 353 F. Supp. 744, 749, 749 n.2 (S.D. Ohio 1972), *aff'd sub nom. Grit* v. *Wolman,* 413 U.S. 901 (1974).

[22] The district court held in a per curiam opinion that the legislature had indeed eliminated the unconstitutional direct grants involved in *Wolman I.* However, the tax credits substituted for the direct grants accrued to the same sectarian group as before and the ploy was recognized by the Court. *Id.*

It takes little imagination, however, to suggest that it was divisive in the extreme to have proponents and opponents of parochial aid quarreling in the courts at the instigation of the State.

During the summer of 1973, the Ohio General Assembly again became the arena for the antagonists. The General Assembly appropriated 81.4 million dollars under an "auxiliary services" plan. This plan led to the filing of *Wolman III*. *Wolman* v. *Essex,* CA 73-292 (S.D. Ohio 1973), *vacated,* 421 U.S. 982 (1975). This was the third time in as many years that the Ohio legislature had appropriated the same approximate amount of money for aid to privately maintained religious primary and secondary schools. Again, only the terms had been changed—form still taking precedence over substance.

The District Court ruled in favor of the appropriation, reasoning that the materials and services were not religious in nature and, therefore, in line with *Allen,* could be provided to the parochial schools. Following *Meek, Wolman III* was vacated and remanded for reconsideration. *Id.*

When it became obvious to all that *Meek* would be applicable to the auxiliary services program, the legislature changed the form, but still not the substance, of the legislation and, for the fourth time, appropriated the same money. It is this Act, signed into law just prior to the beginning of the 1975-76 school year, that is the subject of the current litigation.

This short history demonstrates the complicated struggle to provide aid to parochial schools in almost apparent contravention of the First Amendment. The Ohio legislature, bowing to intensive lobbying, has attempted time and

again to thread the needle between *Allen* and the various other standards established by the Courts. In Ohio, *Nyquist, Lemon* and *Meek* have only intensified the serious and, sometimes bitter, dispute over aiding schools maintained by religious groups. Rather than ending religious divisiveness, the adoption of each new test and each attempt to distinguish *Allen* has brought new litigation and increased religious-political strife. We believe that adoption by the Court of the test set forth below will eliminate the need for this perpetual litigation and halt the religious-political strife which such protracted litigation breeds.

IV.

The Court Should Reverse *Allen* and Adopt More Concrete Standards.

As we have amply demonstrated in the first three sections of this brief, *Allen* has not served the First Amendment well. In fact, Justice Rutledge's words in his dissent in *Everson,* after quoting Thomas Jefferson's Bill for Establishing Religious Freedom, ring truer today than when written:

> I cannot believe that the great author of those words, or the men who made them law, could have joined in this decision. Neither so high nor so impregnable today as yesterday is the wall raised between church and state by Virginia's great statute of religious freedom and the First Amendment, now made applicable to all the states by the Fourteenth. New Jersey's statute sustained is the first, if indeed it is not the second breach to be made by this Court's action. *That a third, and*

> *a fourth, and still others will be attempted, we may be sure.* For just as *Cochran* v. *Louisiana State Board of Education,* 281 U.S. 370, has opened the way by oblique ruling for this decision, so will the two make wider the breach for a third. Thus with time the most solid freedom steadily gives way before continuing corrosive decision.

330 U.S. at 29 (emphasis added).

Yet, *amici* believe that Justice Rutledge overstated the case in *Everson.* For, if properly applied, *Everson* can be a wall which is as impregnable as the First Amendment requires. Of course, as has been suggested throughout this brief, a proper application of *Everson* to this case necessitates the overruling of *Allen.* We would also propose that several principles from the majority opinion of Mr. Justice Black in *Everson* are the benchmarks of a valid employment of the decision.

1) The Court is concerned with *substance,* not *form. Everson* v. *Board of Education of Ewing Township,* 330 U.S. 1, 15 (1946). This proposition was emphasized in language on which the Court was unanimous:

> No tax in any amount, large or small, can be levied to support any religious activities or institutions, *whatever they may be called, or whatever form they may adopt to teach or practice religion. . . .*

330 U.S. at 15-16 (emphasis added); *accord,* 330 U.S. at 33 (Rutledge, J., dissenting).

2) The Court felt that the facts in the case approached the "verge" of the restraints of the establishment clause,

id. at 15, and certainly did not intend the doctrine to be extended beyond its facts.

3) The Court felt that the benefit to the religious institution was a mere by-product of unintended aid. Surely the policeman on the beat, to which the Court analogized, has no direct intention of aiding religious institutions as he performs his duties. 330 U.S. at 25 (Jackson, J., dissenting). The legislation, according to the Court, "does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." *Id.* at 18.

4) The Court in upholding the action as general welfare legislation and in analogizing the benefits conferred thereby to those bestowed by virtue of police and fire services, could never have intended that the case be extended to the loan of school books to students of sectarian schools. The utter outrage expressed by Justice Black in his dissent in *Board of Education* v. *Allen, supra,* makes this obvious.

5) The case involved aid which did not cross the threshold and invade the sanctuary. And, while this fact was not pronounced by the Court, it is apparent that it is the fulcrum on which the opinion stands. *Compare Everson, supra, with Allen,* 392 U.S. 236, 251 (1968) (Black, J., dissenting).

From this analysis of the Court's decision in *Everson,* we believe that a two part test can be abstracted as follows:

Aid will be allowed if either:

(1) it confers a benefit which is a by-product of unintended aid, i.e., fire and police protection (Civil services such as the fire department are not established with the intention of aiding the parochial schools); *or*

(2) (i) the aid does not, either directly or indirectly, cross the threshold of the religious institution, and (ii) the student is the sole beneficiary of the aid. Under the second test, the bussing allowed in *Everson* qualifies; yet the textbook grants or loans ratified in *Allen* must fall. In addition, off-campus medical, dental and other social services will survive challenge.

We presume, however, that the mobile classroom or office parked at the curb near the parochial school, while technically off school property, is across the forbidden threshold. *Amici* arrive at this conclusion since any test that the Court uses must never permit form to govern over substance.

It is respectfully suggested that the above test will support, and is reconcilable with, every primary-secondary parochial school case decided by this Court except *Allen* and the textbook holding portion of *Meek*. Textbooks are an inseparable part of the primary educational functions of parochial schools and are inextricably intertwined with their religious mission. The textbook programs should have been invalidated, if not in *Allen*, then, at least, in *Meek*. This may be the last opportunity for the Court to take "the bolder actions of overruling *Board of Education* v. *Allen* and striking the textbook program in *Meek*." 54 N. Car. L. *Rev*. 216, 224 (1976). This incisive step "would more clearly establish the lines of state neutrality without requiring the sacrifice of consistency," *id.*, and resurrect the "wall of separation" that Mr. Justice Black forged when he authorized *Everson*.

CONCLUSION

Wherefore, *amici* respectfully ask this Court to overrule *Allen* and insure that the "establishment of religion" clause of the First Amendment still means at least this:

> "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. . . ."

330 U.S. at 15-16.

Respectfully submitted,

Leonard J. Schwartz
Andrew M. Fishman
Schwartz & Fishman
150 E. Mound Street
Columbus, Ohio 43215
(614) 221-2600
Attorneys for Amici Curiae

Philip Dunson
145 North High Street
Columbus, Ohio 43215
(614) 228-4859
of Counsel.